

GIBSON, MCCLURE, WALLACE & DANIELS, L.L.P.  
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Attorneys for John Deckard and Peter Frankl

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA**

PETER FRANKL AND  
JOHN DECKARD,

Case No. 3:07-MC-80195-MHP (EMC)

Plaintiffs,

(PENDING IN THE U.S. DISTRICT  
COURT FOR THE NORTHERN  
DISTRICT OF TEXAS 3:05-CV-1757B)  
(*PRO HAC VICE*)

v.

NETOPIA, INC. AND ALAN LEFKOF,

**PLAINTIFFS' MOTION AND NOTICE OF  
MOTION TO COMPEL PRODUCTION OF  
DOCUMENTS**

Defendants.

**TO: THE COURT, ALL PARTIES AND THEIR COUNSEL OF RECORD:**

COMES NOW, Plaintiffs Peter Frankl and John Deckard (hereinafter "Plaintiffs") and file this their Motion to Compel Documents from Morrison & Foerster, LLP pursuant to the Subpoena Duces Tecum served on Morrison & Foerster, LLP on May 9, 2007. Plaintiffs would respectfully show the court the following:

1. Plaintiffs' subpoena served on Morrison & Foerster is attached to the Declaration of Wade L. McClure as Exhibit A.

2. Morrison & Foerster served objections to the subpoena on July 27, 2007, attached to the Declaration of Wade L. McClure as Exhibit B, and served a privilege log on Plaintiffs on August 22, 2007.

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1           3.       In the underlying Texas proceeding, Magistrate Sanderson of the United States District  
2 Court - Dallas Division heard arguments on the very issues that are the subject of this motion on  
3 September 11, 2007. On September 17, 2007, Magistrate Sanderson entered an order granting  
4 Plaintiffs motion to compel, except for one document, and finding that Netopia's privileges were  
5 waived. A copy of the Order is attached to the Declaration of Wade L. McClure as Exhibit C.

6           4.       As further support for this Motion to Compel, Plaintiffs refer to their Memorandum  
7 in Opposition to Netopia's Motion to Quash or Modify Subpoena Duces Tecum filed on September  
8 12, 2007. The Memorandum in Opposition is located on PACER at document no. 10. *Frankl,*  
9 *Deckard v. Netopia, Lefkof*, Case No. 3:07-MC-80195 MHP.

10          5.       As additional support for its motion, Plaintiffs submit the Declaration of Howard  
11 Slayen which is attached to the Declaration of Wade L. McClure as Exhibit D. Paragraph 6 of the  
12 Slayen Declaration states - in pertinent part:

13               After the interviews were completed, the Morrison & Foerster lawyers reported their  
14 findings to the Audit Committee, including myself. **Among other things**, these  
15 lawyers informed the Audit Committee that, during their interviews, Plaintiffs had  
16 provided facts and documents showing they had engaged in intentional wrongdoing  
in connection with certain software transactions they had negotiated, including altering  
documents and concealing material information from Netopia's accounting department.  
(emphasis added)

17          The partial disclosure of this communication and Netopia's reliance on the communication  
18 waives the privileges concerning findings and disclosures by Morrison & Foerster. Plaintiffs' are  
19 entitled to discover all information reported by Morrison & Foerster. *See Kintera, Inc. v. Convio, Inc.*,  
20 219 F.R.D. 503, 511 (9th Cir. 2003). The disclosure of any significant portion of a confidential  
21 communication waives the privilege to the whole. *See also Nguyen v. Excel Corp.*, 197 F.3d 200, 208  
22 (5th Cir.1999). *See* Magistrate Sanderson Order attached to the Declaration of Wade L. McClure as  
23 Exhibit C. The waiver of an attorney-client communication waives the privilege as to all other  
24 communications relating to the same subject matter. *See also SEC v. Brady*, 238 F.R.D. at 441. Thus  
25 all communications and opinions communication by MoFo to Netopia are discoverable.

26          6.       Plaintiffs have submitted the Morrison & Foerster privilege log, which is marked a  
27 confidential, *under seal* in this case for the Court's review.

1 Dated: September 19, 2007

GIBSON, MCCLURE, WALLACE & DANIELS, LLP

2 s/ Wade L. McClure

3 By:

4 Wade L. McClure  
5 8080 N. Central Expressway  
6 Suite 1300, LB50  
7 Dallas, Texas 75206-1838  
8 Telephone: (214) 891-8040  
9 Facsimile: (214) 891-8010  
10 wmcclure@gmwd.com

11 Attorneys for John Deckard and Peter Frankl

12 **PROOF OF SERVICE**

13 I am a citizen of the United States and employed in Dallas County, Texas. I am over the age  
14 of eighteen and not a party to the within-entitled action. I declare that I am an attorney at law admitted  
15 *pro hac vice* to practice in the Northern District of California. My business address is 8080 N.  
16 Central Expressway, Suite 1300, Dallas, Texas 75206. On September 19, 2007, I caused to be served  
17 by operation of the Court's electronic filing system a true and correct copy of the within document:

18 **PLAINTIFFS' MOTION AND NOTICE OF**  
19 **MOTION TO COMPEL PRODUCTION OF DOCUMENTS**

20 by delivering copies thereof to:

21 Roland Michael Juarez, Esq.  
22 rjuarez@akingump.com

23 Service on attorney admitted *pro hac vice* for Defendant Netopia served via First Class Mail:

24 Stephanie Osteen  
25 Akin Gump Strauss Hauer & Feld LLP  
26 1700 Pacific Avenue  
27 Suite 4100  
28 Dallas, Texas 75201

Executed on September 19, 2007, at Dallas, Texas 75206.

s/ Wade L. McClure

Wade L. McClure

**PLAINTIFFS' MOTION AND NOTICE OF**  
**MOTION TO COMPEL PRODUCTION OF**  
**DOCUMENTS**

Case No. 3:07-MC-80195-MHP (EMC)

**DECLARATION OF WADE L. MCCLURE**

I, Wade L. McClure, hereby declare as follows:

1. I am an attorney at law admitted *pro hac vice* to practice in the Northern District of California and a partner in the law firm of Gibson, McClure, Wallace & Daniels, LLP, attorneys for Plaintiffs Peter Frankl and John Deckard. I have personal knowledge of the facts stated herein, and if called and sworn as a witness, I would and could testify competently under oath thereto. I submit this declaration in support of the Administrative Motion to Compel Production of Documents.

2. Attached hereto as **Exhibit A** is a true and correct copy of Plaintiffs' Subpoena served on Morrison & Foerster and filed in *Peter Frankl and John Deckard v. Netopia, Inc. and Alan Lefkof*, Case No. 3-05-CV-1757-B.

3. Attached hereto as **Exhibit B** is a true and correct copy of the Motion of The Netopia Audit committee to Quash or Modify Subpoena Duces Tecum filed in *Peter Frankl and John Deckard v. Netopia, Inc. and Alan Lefkof*, Case No. 3-05-CV-1757-B.

4. Attached hereto as **Exhibit C** is a true and correct copy of the Order granting Plaintiffs' Motion to Compel filed in *Peter Frankl and John Deckard v. Netopia, Inc. and Alan Lefkof*, Case No. 3-05-CV-1757-B.

5. Attached hereto as **Exhibit D** is a true and correct copy of the Declaration of Howard Slayen filed in *Peter Frankl and John Deckard v. Netopia, Inc. and Alan Lefkof*, Case No. 3-05-CV-1757-B.

I declare under penalty of perjury under the laws of the United States of America that the foregoing declaration consisting of five numbered paragraphs is true and correct, and is based upon personal knowledge.

Executed this 19th day of September, 2007, at Dallas, Texas.

s/ Wade L. McClure

\_\_\_\_\_  
Wade L. McClure

## **EXHIBIT A**

1. All documents, electronically stored information (“ESI”), and materials collected, reviewed, and/or created by Morrison & Foerster, LLP in connection with its investigation for and on behalf of Netopia and/or the Netopia Audit Committee in 2004, including without limitation, notes from interviews, e-mails, and other documentation collected from Netopia employees and representatives; intra-Morrison & Foerster emails, memos, and ESI; and any other documents and ESI obtained from third parties, including but not limited to ICC, KPMG or the SEC. ESI should be produced in a reasonably usable format for Microsoft Windows systems.
  2. All original metadata regarding creation, access, storage, modification/alteration, and sharing for the ESI requested above.
- The Plaintiffs herein have entered into a confidentiality and protective order and will agree that any and all documents and ESI that you produce in connection with this subpoena, designated “Confidential,” shall be subject to the terms of that confidentiality and protective order.



**AKIN GUMP STRAUSS HAUER & FELD LLP**

ROLAND M. JUAREZ (SBN 160793)

2029 Century Park East, Suite 2400

Los Angeles, California 90067-3012

Telephone: 310-229-1000

Facsimile: 310-229-1001

Email: rjuarez@akingump.com

Attorneys for The Netopia Audit Committee

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

PETER FRANKL AND JOHN  
DECKARD,

Plaintiffs,

v.

NETOPIA, INC. AND ALAN LEFKOF,

Defendants.

Case No. 3:05-CV-1757-B ECF

**(PENDING IN THE U.S. DISTRICT  
COURT FOR THE NORTHERN  
DISTRICT OF TEXAS)**

**MOTION OF THE NETOPIA AUDIT  
COMMITTEE TO QUASH OR MODIFY  
SUBPOENA DUCES TECUM**

The Netopia Audit Committee respectfully requests that the Court quash or modify the subpoena duces tecum served on Non-Party Morrison & Foerster LLP to prohibit Plaintiffs Peter Frankl and John Deckard from discovering documents protected from disclosure by the attorney-client privilege and work product doctrine, and any other privilege applicable under the federal law or rule of procedure.

**I. INTRODUCTION**

On May 9, 2007, Plaintiffs served a subpoena duces tecum on Non-Party Morrison & Foerster LLP. A copy of the subpoena is attached as Exhibit A to this motion.<sup>1</sup> Morrison & Foerster was hired by the Netopia Audit Committee to provide legal guidance in the face of

<sup>1</sup> The date for Morrison & Foerster to comply with the subpoena was extended by agreement to July 27, 2007. (Letter from Wade L. McClure to Douglas L. Hendricks dated June 7, 2007, attached as Exhibit C to this motion.)

1 potential claims. Specifically, Morrison & Foerster was engaged by the Audit Committee to  
2 assist and advise the Audit Committee in its investigation of, among other things, revenue  
3 recognized in two computer software transactions with one of Netopia's customers, Interface  
4 Computer Company. (Declaration of Craig Martin ("Martin Decl.") ¶ 3, attached hereto as  
5 Exhibit B.) Pursuant to this engagement, Morrison & Forester, on behalf of the Audit  
6 Committee, collected and reviewed documents and conducted witness interviews from  
7 approximately July 2004 through September 2004. (Ex. B, Martin Decl. ¶ 4.) To assist in the  
8 investigation, Morrison & Forester also engaged Walter Rush, a forensic accountant, to act as  
9 its accounting advisor. (Ex. B, Martin Decl. ¶ 4.) Morrison & Foerster lawyers exercised their  
10 judgment and analytical skills in selecting and distilling the large volume of information under  
11 review for purposes of providing legal advice to the Audit Committee. (Ex. B, Martin Decl.  
12 ¶ 4.)

13 During the course of the investigation, Morrison & Foerster attorneys kept members of  
14 the Audit Committee apprised of the facts and documents collected, and shared with the Audit  
15 Committee Morrison & Foerster's analysis and legal advice. (Ex. B, Martin Decl. ¶ 5.) At the  
16 conclusion of the investigation, Morrison & Foerster presented a summary of relevant facts and  
17 documents collected during the course of the Audit Committee's investigation, and provided  
18 the Audit Committee with further legal advice and analysis. (Ex. B, Martin Decl. ¶ 5.)

19 In their subpoena, Plaintiffs request, among other things, "all documents, electronically  
20 stored information ("ESI"), and materials collected, reviewed, and/or created by Morrison &  
21 Foerster, LLP in connection with its investigation for and on behalf of Netopia and/or the Netopia  
22 Audit Committee in 2004, including without limitation, notes from interviews, e-mails, and other  
23 documentation collected from Netopia employees and representatives; intra-Morrison & Foerster  
24 emails, memos, and ESI obtained from third parties, including but not limited to ICC, KPMG or  
25 the SEC." (Ex. A, Subpoena.) Because the attorney-client privilege and work product doctrine  
26 clearly protect these documents, the Netopia Audit Committee requests that the Court quash or  
27 modify Plaintiffs' subpoena.  
28



## II. ARGUMENT

### **Plaintiffs' Subpoena Seeks Documents Protected From Disclosure By The Attorney-Client Privilege And Work Product Doctrine.**

The attorney-client privilege protects communications between lawyers and agents of a client where such communications are for the purposes of rendering legal advice. *Upjohn Co. v. United States*, 449 U.S. 383 (1981); *Smith v. McCormick*, 914 F.2d 1153, 1159 (9th Cir. 1990); *Segerstrom v. United States*, No. C 00-0833 I, 2001 WL 283805, at \*2, 2001-1 U.S. Tax Cas. (CCH) P 50,315 (N.D. Cal. Feb. 6, 2001) (citing *United States v. Kovel*, 296 F.2d 918, 921 (2d Cir. 1961)). The privilege has expressly been extended to communications, such as the ones at issue here. See *Lawrence E. Jaffe Pension Plan v. Household Intern., Inc.*, No. 02 C 5893, 2006 WL 3524016, at \*4-6 (N.D. Ill. Dec. 6, 2006) (attorney-client privilege not waived on documents and communications underlying internal investigation); *In re OM Securities Litig.*, 226 F.R.D. 579, 587-89 (N.D. Ohio 2005) (documents and communications prepared by outside counsel used in internal Audit Committee investigation are privileged); *Abdallah v. Coca-Cola Co.*, No. CIV A1:98CV3679RWS, 2000 WL 33249254, at \*2-3 (N.D. Ga. Jan. 25, 2000) (privilege not waived when company's corporate counsel retained outside employment law consultant to conduct internal investigation). Materials and information exchanged between Morrison & Foerster and Netopia's Audit Committee in connection with the investigation are thus protected by the attorney-client privilege and Plaintiffs subpoena should be quashed or modified to the extent it seeks to discover these privileged documents.

Similarly, any all work product collected, reviewed, created, or obtained by Morrison & Foerster in connection with the investigation is protected. See FED. R. CIV. P. 26(b)(3) (limiting discovery of documents prepared in anticipation of litigation by a party or that party's representatives, including attorneys, insurers, consultants, suretys, indemnitors or agents, and instructing courts to protect the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party from disclosure); *In re Copper Mkt. Antitrust Litig.*, 200 F.R.D. 213, 220 (S.D.N.Y. 2001) ("Once it is established that a document was prepared in anticipation of litigation, work-product immunity protects 'documents prepared by or for a



representative of a party, including his or her agent.”); *United States v. Mobil Corp.*, 149 F.R.D. 533, 537-38 (N.D. Tex. 1993) (work product created during the course of an investigation is protected from discovery). Waiver of work product immunity will only occur if the disclosure “substantially increases the opportunity for potential adversaries to obtain the information.” *In re Copper Mkt.*, 200 F.R.D. at 221. No such waiver can be found to exist here. As such, the work product doctrine operates to protect all work product in the possession of Morrison & Foerster and Plaintiffs’ subpoena should be quashed or modified to the extent it seeks such documents.

### III. CONCLUSION

For the foregoing reasons, the Netopia Audit Committee respectfully requests that the Court grant its motion to quash or modify the subpoena duces tecum to Morrison & Foerster to the extent it seeks documents protected from disclosure by the attorney-client privilege, work product doctrine, or any other applicable privilege.

Dated: July 27, 2007

**AKIN GUMP STRAUSS HAUER & FELD LLP**

By   
Roland M. Juarez v/p 927

Attorneys for the Netopia Audit Committee

**PROOF OF SERVICE**

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles. I am over the age of 18 and not a party to the within action; my business address is: 2029 Century Park East, Suite 2400, Los Angeles, CA 90067. On July 27, 2007, I served the foregoing document(s) described as: **The Netopia Audit Committee's Motion To Quash Subpoena Duces Tecum and For Protection** on interested parties in this action by placing ☐ the original ☒ true copy(ies) thereof enclosed in sealed envelopes\* as follows: (\*Name and address of the person served as shown on the envelope.)

Wade McClure  
Gibson, McClure, Wallace & Daniels  
8080 N. Central Expressway  
Suite 1300, LB 50  
Dallas, Texas 75206  
Telephone: (214) 891-8040  
Facsimile: (214) 891-8010

*Attorney for Plaintiffs*

☒ BY MAIL I am readily familiar with the firm's practice of collection and processing correspondence for mailing with the U.S. postal service. Under that practice it would be deposited with U.S. postal service on that same day with postage thereon fully prepaid at Los Angeles, CA 90067 in the ordinary course of business. The envelope was sealed and placed for collection and mailing on that date following ordinary business practices. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or posted meter date is more than one day after date of deposit for mailing in affidavit.

Executed on July 27, 2007 at Dallas, Texas.

*Roland M. Juarez*

[Print Name Of Person Executing Proof]

*w/p 927**Roland Juarez*

[Signature]

*w/p 927*

6118772

SAO88 (Rev. 12/06) Subpoena in a Civil Case

**Issued by the**  
**UNITED STATES DISTRICT COURT**  
 NORTHERN DISTRICT OF CALIFORNIA

PETER FRANKL AND JOHN DECKARD

**SUBPOENA IN A CIVIL CASE**

V.

NETOPIA, INC. &amp; ALAN LEFKOF

Case Number:<sup>1</sup> 3:05-CV-1757-B ECF

**NORTHERN DISTRICT OF TEXAS**  
**Dallas Division**

TO: Craig Martin  
 Morrison and Foerster  
 425 Market Street  
 San Francisco, CA 94105

- ☐ YOU ARE COMMANDED to appear in the United States District court at the place, date, and time specified below to testify in the above case.

PLACE OF TESTIMONY	COURTROOM
	DATE AND TIME

- ☒ YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case.

PLACE OF DEPOSITION Morrison and Foerster, 425 Market Street, San Francisco, CA 94105	DATE AND TIME 7/25/2007 9:00 am
--	------------------------------------

- ☒ YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects at the place, date, and time specified below (list documents or objects):

ANY AND ALL RECORDS AS REQUESTED IN THE ATTACHED EXHIBIT "A".

PLACE Morrison and Foerster, 425 Market Street, San Francisco, CA 94105	DATE AND TIME 6/4/2007 9:00 am
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- ☐ YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below.

PREMISES	DATE AND TIME
----------	---------------

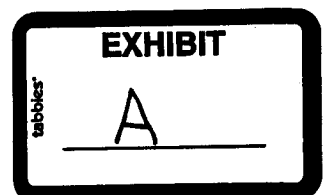
Any organization not a party to this suit that is subpoenaed for the taking of a deposition shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. Federal Rules of Civil Procedure, 30(b)(6).

ISSUING OFFICER'S SIGNATURE AND TITLE (INDICATE IF ATTORNEY FOR PLAINTIFF OR DEFENDANT) <i>Waide L. McClure, Jr., Attorney</i>	DATE 5-9-07
ISSUING OFFICER'S NAME, ADDRESS AND PHONE NUMBER	

WAIDE L. MCCLURE, 8080 N. CENTRAL EXPRESSWAY, SUITE 1300, DALLAS, TEXAS 75206 (214) 891-8040

(See Rule 45, Federal Rules of Civil Procedure, Subdivisions (c), (d), and (e), on next page)

<sup>1</sup> If action is pending in district other than district of issuance, state district under case number.



AO88 (Rev. 12/06) Subpoena in a Civil Case

## PROOF OF SERVICE

DATE

PLACE

SERVED

SERVED ON (PRINT NAME)

MANNER OF SERVICE

SERVED BY (PRINT NAME)

TITLE

## DECLARATION OF SERVER

I declare under penalty of perjury under the laws of the United States of America that the foregoing information contained in the Proof of Service is true and correct.

Executed on

DATE

SIGNATURE OF SERVER

ADDRESS OF SERVER

## Rule 45, Federal Rules of Civil Procedure, Subdivisions (c), (d), and (e), as amended on December 1, 2006:

## (c) PROTECTION OF PERSONS SUBJECT TO SUBPOENAS.

(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

(2) (A) A person commanded to produce and permit inspection, copying, testing, or sampling of designated electronically stored information, books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial.

(B) Subject to paragraph (d)(2) of this rule, a person commanded to produce and permit inspection, copying, testing, or sampling may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to producing any or all of the designated materials or inspection of the premises — or to producing electronically stored information in the form or forms requested. If objection is made, the party serving the subpoena shall not be entitled to inspect, copy, test, or sample the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production, inspection, copying, testing, or sampling. Such an order to compel shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection, copying, testing, or sampling commanded.

(3) (A) On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it

(i) fails to allow reasonable time for compliance;

(ii) requires a person who is not a party or an officer of a party to travel to a place more than 100 miles from the place where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c)(3)(B)(iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held;

(iii) requires disclosure of privileged or other protected matter and no exception or waiver applies; or

(iv) subjects a person to undue burden.

(B) If a subpoena

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or

(iii) requires a person who is not a party or an officer of a party to incur substantial expense to travel more than 100 miles to attend trial, the court may, to protect a person subject

to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

## (d) DUTIES IN RESPONDING TO SUBPOENA.

(1) (A) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(B) If a subpoena does not specify the form or forms for producing electronically stored information, a person responding to a subpoena must produce the information in a form or forms in which the person ordinarily maintains it or in a form or forms that are reasonably usable.

(C) A person responding to a subpoena need not produce the same electronically stored information in more than one form.

(D) A person responding to a subpoena need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or to quash, the person from whom discovery is sought must show that the information sought is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2) (A) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial-preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

(B) If information is produced in response to a subpoena that is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The person who produced the information must preserve the information until the claim is resolved.

(c) CONTEMPT. Failure of any person without adequate excuse to obey a subpoena served upon that person may be deemed a contempt of the court from which the subpoena issued. An adequate cause for failure to obey exists when a subpoena purports to require a nonparty to attend or produce at a place not within the limits provided by clause (ii) of subparagraph (c)(3)(A).

## **EXHIBIT A**

1. All documents, electronically stored information (“ESI”), and materials collected, reviewed, and/or created by Morrison & Foerster, LLP in connection with its investigation for and on behalf of Netopia and/or the Netopia Audit Committee in 2004, including without limitation, notes from interviews, e-mails, and other documentation collected from Netopia employees and representatives; intra-Morrison & Foerster emails, memos, and ESI; and any other documents and ESI obtained from third parties, including but not limited to ICC, KPMG or the SEC. ESI should be produced in a reasonably usable format for Microsoft Windows systems.
  2. All original metadata regarding creation, access, storage, modification/alteration, and sharing for the ESI requested above.
- The Plaintiffs herein have entered into a confidentiality and protective order and will agree that any and all documents and ESI that you produce in connection with this subpoena, designated “Confidential,” shall be subject to the terms of that confidentiality and protective order.

IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

PETER FRANKL and  
JOHN DECKARD,

Plaintiffs,

v.

NETOPIA, INC., et al.,

Defendants.

§  
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§  
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§  
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§  
§  
§

Case No. 3:05-CV-1757-B  
ECF

**DECLARATION OF CRAIG MARTIN**

I, CRAIG MARTIN, declare as follows:

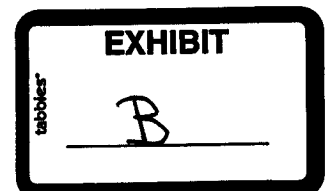
1. I am over the age of twenty-one (21) years, have never been convicted of a felony, am competent to make this declaration, and have personal knowledge of the facts stated herein.

2. I graduated from Stanford University Law School in 1993 and am duly licensed to practice law in the State of California. I am a partner in the securities litigation and white-collar defense practice group at the law firm of Morrison & Foerster LLP.

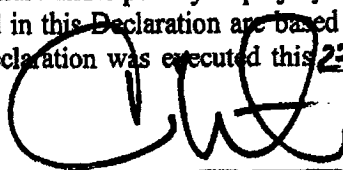
3. On or around July 19, 2004, the Audit Committee of Netopia, Inc. retained Morrison & Foerster to provide legal guidance in the face of potential claims. Morrison & Foerster was engaged by the Audit Committee to assist and advise the Audit Committee in its investigation of, among other things, revenue recognized in two computer software transactions with one of Netopia's customers, Interface Computer Company.

4. Pursuant to this engagement, Morrison & Foerster, on behalf of the Audit Committee, collected and reviewed documents and conducted witness interviews from approximately July 2004 through September 2004. To assist in the investigation, Morrison & Foerster also engaged Walter Rush, a forensic accountant, to act as its accounting advisor. Morrison & Foerster lawyers exercised their judgment and analytical skills in selecting and distilling the large volume of information under review for purposes of providing legal advice to the Audit Committee.

5. During the course of the investigation, Morrison & Foerster attorneys kept members of the Audit Committee apprised of the facts and documents collected, and shared with the Audit Committee Morrison & Foerster's analysis and legal advice. At the conclusion of the investigation, Morrison & Foerster presented a summary of relevant facts and documents collected during the course of the Audit Committee's investigation, and provided the Audit Committee with further legal advice and analysis.



In accordance with 28 U.S.C. § 1746, I declare under penalty of perjury under the laws of the United States of America that the facts stated in this Declaration are based on my personal knowledge and are true and correct, and this Declaration was executed this ~~27th~~ day of July, 2007 in SAN FRANCISCO, California.

A handwritten signature in black ink, appearing to read 'CW', is written over a horizontal line.

Craig Martin

#6118589



## GIBSON, MCCLURE, WALLACE & DANIELS

A REGISTERED LIMITED LIABILITY PARTNERSHIP  
ATTORNEYS AND COUNSELORS

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June 7, 2007

Via U.S. Mail and  
Facsimile: 415-268-7522

Douglas L. Hendricks  
Morrison Foerster  
425 Market Street  
San Francisco, CA 94105-2482

Re: *Frankl, et al v. Netopia, Inc., et al*, U.S. District  
Court, Northern District of California, Case No. 3:05-DV-  
1757-B

Dear Mr. Hendricks:

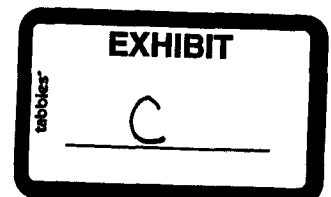
Pursuant to my recent conversation with Stephanie Osteen, this letter confirms that I have agreed to extend Craig Martin and Morrison Foerster's time to respond and object to our third-party subpoena until July 27, 2007.

This extension is subject to the granting of the parties' motion to extend the discovery deadline to September 30, 2007. Should the Court deny this motion, the extension will be reduced to two weeks from the date that you receive notice of the Court's denial of the motion.

Sincerely yours,

*Wade L. McClure*  
Wade L. McClure

WLM/lm  
cc: Stephanie Osteen



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Attorneys for The Netopia Audit Committee

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

PETER FRANKL AND JOHN  
DECKARD,

Plaintiffs,

v.

NETOPIA, INC. AND ALAN LEFKOF,

Defendants.

Case No. 3:05-CV-1757-B ECF

**(PENDING IN THE U.S. DISTRICT  
COURT FOR THE NORTHERN  
DISTRICT OF TEXAS)**

**PROPOSED ORDER**

THE COURT, having considered the Netopia Audit Committee's Motion to  
Quash or Modify Subpoena Duces Tecum and the arguments of counsel, hereby  
GRANTS the Motion and ORDERS the subpoena duces tecum quashed.

Signed this \_\_\_\_\_ day of \_\_\_\_\_, 2007.

\_\_\_\_\_  
PRESIDING JUDGE

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION**

<b>PETER FRANKL and JOHN DECKARD</b>	)	
	)	
<b>v.</b>	)	<b>3-05-CV-1757-B</b>
	)	
<b>NETOPIA, INC. and ALAN LEFKOF</b>	)	

**ORDER**

Pursuant to the District Court's order of reference came on to be heard Plaintiff's motion to compel filed on June 28, 2007, and the court finds and orders as follows:

At issue are Defendants' responses to Plaintiffs' Rule 34 requests. Although Defendants' responses initially identified multiple grounds for their objections to specific requests for production (See Exhibit G to Plaintiffs' motion), they ultimately produced approximately 8500 pages of documents, but made clear that certain documents within the purview of Plaintiffs' requests were being withheld based on claims that they were protected from disclosure by virtue of attorney-client privilege and the attorney work product doctrine. Defendants have submitted to Plaintiffs' counsel a privilege log. Exhibit H to Plaintiffs' motion.

In response to Plaintiffs' motion to compel, Defendants represent that only 53 documents<sup>1</sup> in their possession or control - those identified in their privilege log - have not been produced or made available for inspection by Plaintiffs. Therefore, the sole remaining issue is whether the withheld documents are protected from disclosure as being privileged. To this end Defendants have produced copies of the withheld documents for *in camera* inspection by the court. (See Exhibit N to Defendants' response Appendix).

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<sup>1</sup>As evidenced by Defendants' privilege log many of the documents consist of multiple pages.



With the exception of David Kadish's e-mail sent on April 22, 2004 at 9:50 a.m., none of the contents of Documents 1 through 8, 21; 24, 25, 27, 34, 35, 36, 37, 38, 39, 41, 42, 43, 44, 45, 46, 48 and 49 is protected by attorney client privilege.

Whether any protection is due to the remainder of the documents on Defendants' privilege log is less readily determinable. As Defendants point out David Kadish's role as general counsel for Netopia required him to function as both a lawyer and a business person. Because the attorney-client privilege protects only communications which seek or provide legal advice, a corporate entity operates at its peril when its general counsel is assigned business functions as well as functions which relate to providing legal advice.

*In camera* inspection of the remaining withheld documents, i.e. Documents 22, 23, 26, 28 through 33, 40, 47 and 50 suggest a blurring of functions in several instances, where it appears that Mr. Kadish is acting more in his capacity of vice president of Netopia in assembling and disseminating information with respect to the company's business dealings with Interface Computer Co. and in drafting news releases for media that in discharging attorney-client functions.

However, I find that the attorney-client privilege has been waived with respect to communications between Netopia and David Kadish. The materials before the court show that Netopia was the subject of investigation by two federal agencies, the Securities and Exchange Commission (SEC) and OSHA.

Kadish appeared on three dates for deposition at the instance of the SEC (Exhibit N at 51, 52 and 53). As the transcript of the November 30, 2004, session makes clear, his appearance was obtained by subpoena. As stated in his affidavit, Kadish relates that in the course of his deposition he was questioned about legal advice which he gave to Netopia (Exhibit I at ¶ 17).

Netopia contends that in so testifying the attorney-client privilege was not waived, noting that the initial session was preceded by a letter from Netopia's counsel, Morris & Foerster, LLP, noting that in producing documents it did not intend to waive the protection of the attorney work product doctrine or the attorney-client privilege (Exhibit K, Attachment A). However, no mention is made with respect to any deposition testimony in the context of the SEC's investigation.

The mere fact that Kadish appeared pursuant to subpoena does not warrant the conclusion that his testimony was compelled. *E.g. see Nguyen v. Excel Corp.*, 197 F.3d 200, 206 and n. 12 (5<sup>th</sup> Cir. 1999). ("A client waives the attorney-client privilege ... by failing to assert it when confidential information is sought in legal proceedings.") Moreover, the court rejects the "selective waiver" doctrine set out in *Diversified Industries Inc. v. Meredith*, 572 F.2d 596, 611 (8<sup>th</sup> Cir. 1977), and follows the majority of courts which do not apply it. *See S.E.C. v. Brady*, 238 F.R.D. 429, 440 (N.D. Tex. 2006) (collecting cases).

Defendants' privilege log also contains handwritten notes of Mr. Kadish (Exhibit N at 26) which he made concerning Netopia's dealings with ICC on the Philadelphia transaction when payment on the sale had not been received. As such, these documents constitute attorney work product and under the circumstances presented ordinarily would not be discoverable. *E.g. see Ferko v. National Association for Stock Car Auto Racing*, 218 F.R.D. 125, 135-136 (E.D. Tex. 2003). It should be remembered that the doctrine protects against disclosure of documents, not facts. Also it is likely that an attorney's handwritten notes include his mental impressions and legal theories. Therefore, Defendant's objection to producing Item 26 on its privilege log will be conditionally

sustained.<sup>2</sup>

IT IS, THEREFORE, ORDERED that Plaintiffs' motion to compel is granted and Defendant will produce the documents listed on its privilege log with the exception of Item 16, unless Mr. Kadish's handwritten notes were previously produced to the Securities and Exchange Commission.

A copy of this order shall be transmitted to counsel for the parties.

SIGNED this 17th day of September, 2007.



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UNITED STATES MAGISTRATE JUDGE

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<sup>2</sup>If Mr. Kadish provided a copy of Item 26 to the S.E.C., then such a fact would waive the work product protection. However, the court has not red his 165 page deposition to see if such occurred.

IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION

PETER FRANKL and  
JOHN DECKARD,

Plaintiffs,

v.

NETOPIA, INC., et al.,

Defendants.

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Case No. 3:05-CV-1757-B  
ECF

**DECLARATION OF HOWARD SLAYEN**

I, HOWARD SLAYEN, declare as follows:

1. I am over the age of twenty-one (21) years, have never been convicted of a felony, am competent to make this declaration, and have personal knowledge of the facts stated herein.

2. I have been a member of the board of directors of Netopia, Inc. ("Netopia") and the board's audit committee (the "Audit Committee") since approximately April 2003. The only other members of the Audit Committee between July and September 2004 were Defendants Robert Lee and Harold Wills.

3. I am, and for the last twenty-four years have been, a resident of California. I live and work in Atherton, California. My current residence is 2 Altree Ct., Atherton, California 94027-2224.

4. Since moving to California in September 1982, I have not owned any property in Texas, maintained a bank account in Texas, owned any assets or investments in Texas, or maintained a home in Texas. I have no personal contacts with Texas and have not conducted any personal business in Texas since September 1982. To the extent I have made occasional visits to Texas during this time, they were to conduct business for Coopers & Lybrand, now





PricewaterhouseCoopers, in my capacity as a partner in that firm. I have never been in Texas in connection with my service on the board of directors of Netopia.

5. Plaintiffs Peter Frankl and John Deckard are former employees of Netopia. Both were terminated from Netopia in September 2004 following an investigation conducted by attorneys from the San Francisco office of the Morrison & Foerster law firm, acting as outside counsel for the Audit Committee (the “Audit Committee Investigation”).

6. The Audit Committee Investigation began in or around July 2004 after Netopia learned it had received improper documentation concerning a software sales transaction. As part of the Audit Committee Investigation, the Morrison & Foerster lawyers went to Netopia’s Texas office to interview certain employees, including Plaintiffs. After the interviews were completed, the Morrison & Foerster lawyers reported their findings to the Audit Committee, including myself. Among other things, these lawyers informed the Audit Committee that, during their interviews, Plaintiffs had provided facts and documents showing they had engaged in intentional wrongdoing in connection with certain software transactions they had negotiated, including altering documents and concealing material information from Netopia’s accounting department.

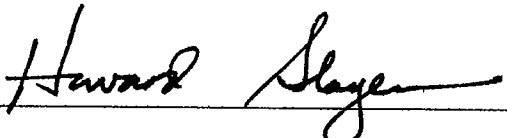
7. On or around September 14, 2004, I participated telephonically in a meeting of Netopia’s board of directors in Emeryville, California. During the meeting, the Audit Committee discussed the results of the Audit Committee Investigation, including outside counsels’ interviews with Plaintiffs.

8. Based on the information reported by outside counsel concerning Plaintiffs’ misconduct, I and the other members of the Audit Committee recommended to the board during the meeting that Plaintiffs’ employment be terminated. Following our report and recommendation, the board of directors, including myself, voted unanimously to terminate

Plaintiffs' employment. The board then instructed the Company's President and Chief Executive Officer, Alan Lefkof, to carry out the terminations.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 15<sup>th</sup> day of December, 2006 in Atherton, California.

A handwritten signature in cursive script, reading "Howard Slayen", is written over a horizontal line.

Howard Slayen